CHOK MONG HOO

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[CRIMINAL APPEAL NO. T (42) 20 OF 1994]
15 DECEMBER 1994

CRIMINAL PROCEDURE: *Trial before Magistrate - Need for Court to be seen to be impartial - Magistrate seeing witness and prosecuting officer in chambers in absence of Counsel for accused during trial - Whether undesirable - Whether trial vitiated - Conviction - Whether to be set aside.*

This was an appeal by the appellant against his conviction and sentence in respect of an offence of criminal breach of trust under s. 408 Penal Code. Inter alia the appellant argued that the trial before the Magistrate was vitiated by partiality as the Magistrate, during the pendency of the trial, had adjourned the proceedings several times in order to see a witness and the prosecution officer privately in his chambers and in the absence of Counsel for the appellant. The appellant also contended that the Magistrate had erred when he ruled, after amending the charge at the end of the prosecution case, that only the defence witnesses could thereafter be recalled or examined.

The issue that arose was whether in the circumstances herein serious errors had been committed by the Magistrate as to vitiate the trial of the case.

Held:

[1] It is undesirable that any discussion should take place between a Magistrate and a witness or the prosecution officer in the absence of the accused or his Counsel. The appearance of justice is part of the substance of justice. Therefore it will not do if the accused person or the public derive the impression that a Magistrate was bent on conviction from the very beginning of the trial on account of the Magistrate seeing the witness and the prosecution officer in his chambers in the absence of Counsel for the accused in the course of a trial. There is no doubt that such a meeting will justify the suspicion that the Magistrate was tutoring the witness and the prosecution officer, and was thus bent on conviction rather than discerning the truth of the case.

[2] The Magistrate also erred when he stated, after amending the charge, that only the defence witnesses could be recalled. Section 162 of the CPC clearly states that the accused is allowed to recall and examine, with reference to such alteration or addition, any witness who may have been examined and also call further evidence which may be material. In the circumstances the Magistrate had committed serious errors which vitiated the trial of the case.

[Appeal allowed. Conviction and sentence set aside. Retrial before another Magistrate ordered]

Case referred to:
Lee Cheok Hin v. R [1956] MLJ 131, at p. 133

Legislation referred to:
Penal Code, s. 408
Criminal Procedure Code, s. 162

Other source referred to:
Archbold on Criminal Pleading Evidence & Practice, 43rd Edn, Vol. 1, p. 331

For the appellant - C.C. Liew.
For the Public Prosecutor - Zahir Hussein bin Ahmad Shah, DPP.

JUDGMENT

Ian H.C. Chin J:

Introduction

This is an appeal by Chok Mong Hoo ("the accused") who was on the 22 June 1994 convicted by the learned Magistrate of criminal breach of trust under s. 408 of the Penal Code, the charge of which reads:-

> That you between 2 and 9 January 1992 at the office of Ladang Segaria Sdn Bhd, in the district of Semporna, in the State of Sabah, being a servant of Boustead Estate Agency Sdn Bhd, to wit, a manager of the said Ladang Segaria Sdn. Bhd., a company owned or managed by your employer and that you were entrusted in such capacity with property, to wit, the Ladang Segaria Sdn. Bhd.'s account, did commit criminal breach of trust of the said account in the sum of RM351,000, and that you have thereby committed an offence punishable under s. 408 of the Penal Code.

The accused was sentenced to 2 years imprisonment and fined RM10,000 with no mention of any default imprisonment in the event of a failure to pay the fine. I will proceed to set out the facts of this case as found by the learned Magistrate which are in the main not in dispute.

Facts of Case

Boustead Estates Agency Sdn. Bhd. ("Boustead") managed a plantation owned by Ladang Segaria Sdn. Bhd. ("the company") which is located in Semporna to which the accused was posted as a manager by Boustead. The accused as the manager of the company was allowed to sign cheques to draw on the account of the company which was opened with a bank. The accused had withdrawn RM350,000 from the account by using seven cheques signed by himself and this amount was paid to himself together with another amount of RM1,000 from the company's petty cash. The details pertaining to this total sum of RM351,000 are:-

	Date	Cheque No.	Payee	Amount RM
(1)	02 January 1992	986080	Cash	5,000
(2)	06 January 1992	986083	Cash	20,000
(3)	07 January 1992	986086	Cash	60,000
(4)	07 January 1992	986087	Cash	50,000
(5)	08 January 1992	986101	Cash	40,000
(6)	09 January 1992	986102	Cash	90,000
(7)	09 January 1992	986103	Cash	85,000
			Total	350,000
(8)	09 January 1992		Cash	1,000
		Grand Total		351,000
				======

The evidence also established that in order to enable the accused to make payment out of the account, the expenditure for any particular month must be worked out a month beforehand. The sums required were then requested by the accused through a document called a cash requisition which the accused must sign and forward to Boustead in Kuala Lumpur. The amount requested will then be transferred by telegraph from Boustead's account to the company's account. The accused had on the 13 December 1991 prepared a cash requisition for RM465,000 for expenses for the early half of January 1992 and this sum was according to the requisition of the accused, needed by the 1 January 1992 and for payment of the following:

(1) Check Roll wages		RM 28,000
(2) Suppliers:		
(a) Tawau Blossom	RM45,000	
(b) Syarikat Sabah Minyak	RM25,000	RM 65,000
(3) Contractors:		
(a) FFB Transport Contractor	RM45,000	
(b) Gravelling road work	RM50,000	
(c) Hind Back Hoe	RM20,000	RM115,000
(4) Socso		RM 1,000
Total		RM465,000

The accused also forwarded the second Cash Requisition which stated that the money was required by the 16 January 1992 and this request, for the sum of RM145,000, was for payment of the following:

(1) Staff wages		RM 15,000
(2) Suppliers:		
(a) Syarikat Nadi Supplier	RM30,000	
(b) Syarikat Sabah Oil	RM35,000	
(c) Tawau Blossom	RM45,000	
(d) Syarikat Sri Lintang	RM15,000	
(e) Yoon See Hong	RM10,000	RM130,000
Total		RM145,000

These two sums were, in accordance with the two requisitions, paid to the account of the company. On the 9 January 1992, the accused gave three months' notice of resignation but he was allowed to leave immediately because he had accumulated leave days. He quit after he had drawn the said sum of RM351,000 from the account and from the petty cash of the company. The accused acknowledged taking the money by preparing and signing a payment voucher dated the 8 January 1992 in which the money was stated to have been paid for "cash advances" to him.

The defence of the accused is that Boustead owed him RM3,983,600 and that he was only taking an advance when he took the said RM351,000 and it was in partial satisfaction of his claim. I will not bother to go into the detail of how such sum was arrived at because, for the reasons that I will state shortly, there was a miscarriage of justice in this case which renders the conviction in this case untenable.

Grounds of Appeal

Amendment of Charge

Before I proceeded to set out the reason why the conviction cannot stand there is one ground of appeal which deserves mention and it is that the "learned Magistrate erred in law by drafting a new charge for the prosecution after hearing the submission made by the defence Counsel to suit evidence which had already been given by the prosecution and defence witnesses". The notes of proceeding clearly show that the amendment was made after the close of the case for the prosecution and not at the close of the case for the defence as asserted by Mr C.C. Liew, learned Counsel for the accused. However, there exists a doubt because the learned Magistrate at the close of the case for the defence again read the amended charge to the accused, on the ground that the learned Counsel may have "failed to notice", and thereafter stated that the accused can recall the witnesses for the defence. Pausing here, it seems the learned Magistrate erred when he stated that only the defence witnesses can be recalled because s. 162 of the Criminal Procedure Code clearly states that the accused is allowed to recall or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined and may also call further evidence which may be material. When asked to support his contention with an authority to say that it is wrong for a Magistrate to amend a charge, be it at the close of the case for the prosecution or at the close of the case for the defence, this is what learned Counsel said in reply to the Court:-

> From case law in Supreme Court, I don't actually remember the name of the case, it was indicated that the magistrate should not actively play the role of a prosecutor.

With all due respect to learned Counsel he should have read *Lee Cheok Hin v. R* [1956] MLJ 131, at p. 133, per Taylor J where it was said:

> ... It is the duty of the Court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and in general, the earlier the better but it is at the close of the evidence for the prosecution that the Court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower Courts to consider every charge at that stage and if necessary to amend it then ... It is a mandatory provision which should always be strictly observed ...

While on the subject of a charge, I would add that the amended charge is incorrectly worded. What was alleged to be entrusted is not "the account" but the funds in the bank account of the company and the charge should so state. I will now consider the ground of appeal which I think has substance though learned Counsel did not bother to refer the Court to any authority.

Seeing Witness and Prosecution Officer in Chambers

This ground of appeal is that the learned Magistrate had adjourned the proceedings several times to see a witness and the prosecution officer in private and in the absence of learned Counsel for the accused. The petition did not specify that date or occasion where the learned Magistrate was alleged to have seen the witness and the prosecution officer in chambers. I normally accept a statement from the Bar if Counsel is known to be accurate in his statements from the Bar. Mr. Zahir Hussein bin Ahmad Shah, the learned Deputy Public Prosecutor, did not think that a statement from learned Counsel from the Bar as to roughly when the learned Magistrate saw the witness and the prosecution officer in chambers was enough. In the event I ask learned Counsel to state on oath what he saw with regards to the allegation that the learned Magistrate had seen the witness and prosecution officer in chambers in the

absence of learned Counsel. The hearing was accordingly adjourned to the next day to allow learned Counsel to depose an affidavit which was done, a course which I am in doubt as to its regularity. Nevertheless, my research officer had, upon my instruction, ascertained that the witness and the prosecution officer did see the learned Magistrate in chambers in the absence of learned Counsel. It is said in **Archbold on Criminal Pleading Evidence & Practice**, 43rd Edn, Vol. 1, at p. 331, that it is undesirable, unless absolutely necessary, for private discussions to take place between Judge and Counsel during the trial. I am of the opinion that it is even more undesirable that any discussion should take place between a Magistrate and a witness during a trial in the absence of one party or its Counsel. Equally undesirable it is for a Magistrate to see a prosecution officer together with a witness during the course of a trial. It must always be remembered that the appearance of justice is part of the substance of justice and it will not do if an accused person or the public derive the impression that a Magistrate was bent on conviction from the beginning of the trial on account of the Magistrate seeing the witness and the prosecution officer in his chambers in the absence of Counsel for the accused and in the course of a trial because such a meeting will attract or invite and justify the suspicion that the learned Magistrate was tutoring the witness and the prosecution officer and was, thus, bent on conviction rather then discerning the truth of the case. In the end, the learned Magistrate would not appear to be impartial and justice was not seen to be done.

Conclusion

The errors, *supra*, on the part of the learned Magistrate are of a very serious nature and which vitiated the trial. It was for the reasons that I have set out, *supra*, that I, this morning, set aside the conviction and sentence of the accused and ordered a retrial on a proper charge to be drafted by the prosecution before another learned Magistrate.